

Piercing the Second Reality

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Maximilian Steinbeis Sa 7 Apr 2018

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The legal profession is to build a second reality on top of the first. Turning the bustle and buzz of life into cases and files and bills and crimes: that is what lawyers do. Lawyers are at work in Madrid: They reconstruct the deeds of Catalan top dog independist Carles Puigdemont last October as a violent grasp at independence, “rebellion” under Spanish law and one of its gravest crimes, for which they demand his arrest and extradition. Lawyers are also at work in Schleswig: They reconstruct the same deeds as something less than a violent grasp at independence, which would count as “high treason” under German law and a hardly less serious crime but effectively doesn’t for lack of committed violence, and therefore set Puigdemont free on bail for the time being.

That annoys a lot of people in Spain: What are these German judges thinking to claim to know better than their Spanish counterparts what crimes the awful Puigdemont did or didn’t commit? I think that anger is quite misguided. On the contrary, the Schleswig judges, if I am not mistaken, have done Spain a huge service, and, on top of it, one that demonstrates the functioning of the European legal community in a most heart-warming way in these difficult times.

Whoever builds second realities by profession must take care not to lose contact with the first. Bubbles can occur, like on the stock market: the stuff you try to reconstruct has long since been permeated by the second reality itself, the reconstruction and the reconstructed become hopelessly mingled, and a monstrous structure piles up over the frightened first reality and haunts it with tremendous destructive power – a material for dramas and novels which supplies those other professional reconstructors of second realities, the writers, with all the legal monsters and monster lawyers they like to fill their works of world literature with.

Something like that seems to be happening in Spain right now. What did actually happen in Catalonia last October? A few million citizens put slips of paper in plastic boxes. They expressed their wish for Catalonia to separate from Spain in a sort of collective protest performance, basically just another mass demonstration. There has never been a real grasp at independence, because that would have implied an actual grasp at power, against the will of not just Spain but of roughly half the Catalan citizenry, a resolute revolutionary move to actually take power over Catalonia away from Spain and its authorities, police officers, judges, and into his own, clumsy, Puigdemontian hands.

Puigdemont, that hapless clown, did no such thing, obviously. He travels through Europe instead, complaining to all patient enough to listen how nasty the Spaniards are that they don’t just hand the power over to him of their own accord. Which in turn drives many Spaniards mad with rage, quite understandably, to a point where they take the view that such a degree of passive aggression feels violent enough to fulfill the crime of rebellion after all, just so they can put the damned fellow behind bars for at least 30 years.

I have borrowed the term “Second Reality” from the Austrian novelist Heimito von Doderer, one of my all-time favourites, who wrote many a book about the monstrous constructions individuals and societies build for themselves, constructions that cover the first reality like mould and clog their channels of apperception until they see nothing and hear nothing and feel nothing but what they have resolved to see and hear and feel when building their construction. In such a state of Second Reality, people do their most evil. Puigdemont and his Catalan independentists are trapped in such a Second Reality, and so is the Spanish judiciary. Both are trying hard to make real what by itself never was: a Catalan grasp at independence.

Only a court could pull the plug on this monstrosity. What is more, only an entirely external, uninvolved court, which has absolutely no stakes at all in the unity of the Spanish nation and its constitutional and legal system. This is where the beauty of the European Union as a legal community shows in all its brilliance. It was no central authority, no hierarchically superior power representing the whole and entitled to know and tell the parts what is valid and what is not, that pierced the Spanish judiciary’s Second Reality, but a Higher Regional Court from a small town in Northern Germany most Spaniards have probably never heard of. In the EU, every member state is its brother’s guardian. If one asks the other to extradite a person to his criminal justice, they respect that request even if it’s politically inconvenient, but they will insist on convincing reasons why the state that executes the arrest warrant should consider the behaviour of the wanted person as punishable as the state that issues it. The EU as a mutual Rule of Law insurance: in the Puigdemont case it becomes visible. In the case of Poland, we will need it.

In the land of Don Quixote

When the legendary ULRICH K. PREUSS offered me an article on the Puigdemont cause this week, my response was enthusiastic, as you can imagine. His “Spanish tragedy” tells the “sad story of a mistaken path of defending the integrity of a rightly proud, suffering country through its democratic organs”, and this story has so many strands twisted together that its length is more than thrice of what we usually publish on Verfassungsblog. But rarely is the effort of reading it as well invested as here (if you read German). All these strands are brought together by Preuss, and he spares none of the two parties to the conflict with his scathing metaphors: “If people dress up as lions and make a political demand in public space with imitated lion roar, any sensible observer will understand this not as the demand of lions, but as an utterance by people disguised in fur. Would any sensible person have fur-clad and roaring people beaten up just because lions are dangerous?”

ULRICH KARPENSTEIN and ROYA SANGI point out an alternative way for the Schleswig judges to rid themselves of their responsibility for the correct solution of the Puigdemont case. In their view, there are valid reasons to refer the case to the European Court of Justice in Luxembourg to determine whether the mechanism of the EU arrest warrant also applies in such exceptional cases as this one (German).

How the German Puigdemont extradition case looks from a Spanish perspective, is explained by JORDI NIEVA-FENOLL.

Speaking of arrest warrants, and of mutual Rule of Law insurance in the EU: On the

occasion of the referral of the Irish High Court to the CJEU as to the effect of the lack of independence of the **Polish** judiciary on Polish EU arrest warrants, TOMASZ KONCEWICZ takes a two-part look at the current paradigm shift in the control of the rule of law in the EU.

MARTIN MYCIELSKI, a **Polish** journalist based in Brussels, offers hints and advice from the experience of the PiS-beset civil society under the title “The Authoritarian Regime Survival Guide”.

Hungary is voting this weekend and no one thinks anyone other will emerge victorious than the incumbent Prime Minister and godfather of all intra-EU neo-authoritarian aspirations, Viktor Orbán. BALÁSZ MAJTÉNYI, ALÍZ NAGY and PÉTER KÁLLAI explain the contribution of the current electoral system, skillfully adapted to their needs by Orbán’s people, to that outcome.

In the **Philippines**, President Rodrigo Duterte has announced a constitutional reform to bring federalism to the archipelago and its 100 million inhabitants. CHERYL SAUNDERS and MICHAEL HENRY YUSINGCO describe the procedural obstacles that lie in his way.

Elsewhere

OLIVER GARCÍA was the first in **Germany** to have penetrated the thicket of European, criminal and procedural law in the Puigdemont case with a stringent analysis (German).

FREDERIK FERREAU calls the **German** city of Wetzlar, once the seat of the Imperial Chamber of Justice, a “city of lawlessness” because it rather disobeys the explicit orders of the Federal Constitutional Court than rent out its town hall to the right-wing extremist NPD (German).

MASSIMO FRIGO analyses the CJEU ruling on the transparency of **European** legislation – “a technical case that goes to the heart of the procedure of one of the fundamental institutions in a democracy: Parliament”.

JEAN PHILIPPE DEROSIER wonders what stamp Emmanuel Macron might try to leave on **France’s** constitution during his term of office (French).

MANON ALTWEGG-BOUSSAC and GUILLAUME RICHARD place the decision of the **French** Constitutional Council about pensions for victims of the Algerian war in the context of the development of the principle of equality and solidarity in France since the First World War (French).

IULIA PADEANU explains why the ECtHR did not or could not distance itself from one of the darker spots on its legacy: the 1978 *Ireland v. UK* judgment, in which the Court failed to recognise the British practice of torture in Northern Ireland as such.

SENEM GUROL finds the ECtHR’s ruling on the detention of journalists in **Turkey** fairly well-reasoned and hopes that this will revitalise the Turkish Constitutional Court.

JAMES FOWKES examines how well **South Africa’s** constitution has survived Jacob Zuma’s nine-year presidency.

LAEL K. WEIS describes how **Australia** tries to change its constitution without changing its constitution.

So much for this week. In the next I will travel to Poznan to attend a conference on the rule of law in European countries. Peter Müller, judge at the Federal Constitutional Court, will talk about the separation of powers and independence of the judiciary, and Andrzej Bryk, a law professor from Krakow on apologist of PiS' constitutional policies, about "sources and consequences of the new constitutionalism". New constitutionalism. Hrrmph. I'll report back next week. See you then, and all the best,

Max Steinbeis

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